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ALEXANDER L. STEVAS

No. 83-1541

In The
Supreme Court of the United States
October Term, 1983

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PEARL JEAN McNEIL PORTER,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

—o—

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

—o—

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QUESTION PRESENTED

Was the decision of the North Carolina Court of Appeals affirming the trial court's order which denied the petitioner's pretrial motion to suppress evidence of heroin found in her luggage in conflict with the holding of *Florida v. Royer*, 460 U.S. —, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) and with decisions of the United States Supreme Court involving the Fourth Amendment on the grounds that the petitioner was unconstitutionally seized by law enforcement officers at the door of the airport terminal, that the search of petitioner's purse and discovery of hashish therein was unconstitutional, and that the search warrant issued for the search of petitioner's luggage was issued on insufficient probable cause?

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Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court rules, the State of North Carolina responds to the petition of Pearl Jean McNeil Porter and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The opinion of the North Carolina Court of Appeals in this case is reported in *State v. Porter*, 65 N.C. App. 13,

308 S.E. 2d 767 (1983), appeal and petition for discretionary review denied, — N.C. —, — S.E. 2d — (1984).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Agent Terry Turbeville was a State Bureau of Investigation Agent assigned to the Drug Interdiction Unit at the Raleigh Durham Airport. (Record page 23; Suppression Hearing Transcript page 26). During the first part of January 1982, he received information from two sources concerning narcotics trafficking in the area. First, Detective Jimmy Privette of the Raleigh Police Department told him that an informant had informed him that heroin was being brought into the Raleigh Durham Airport by the defendant or her husband from New York City and that they were bringing it back on their persons or luggage during the latter part of the week. Detective Privette gave Agent Turbeville photographs of the defendant and others. (R.p. 23; T.pp. 23-24).

Second, a long time confidential informant of Agent Turbeville in Raleigh informed him that Pearl and Elbert were bringing narcotics through Raleigh Durham Airport and that they usually came on Thursday or Friday. This informant had always proved reliable. He had given information about armed robberies that had led to four ar-

rests and convictions. He had given reliable drug intelligence information resulting in drug seizures. (R.p. 23; T.pp. 24-25).

Later that same month, on January 21, 1982 Agent Turbeville was working at the Raleigh Durham Airport. At approximately 3:30 to 3:45 p.m. he recognized Elbert Porter and an elderly man waiting for the 4:00 p.m. flight from New York City at Eastern Airlines, Gate 3. All of the passengers from the flight got off. No one met Elbert Porter and the elderly man. Elbert Porter went to the Eastern Airlines Ticket Section and had a conversation. They left the building and left in a Cadillac registered to the defendant. Agent Turbeville asked the girl at the Eastern Airlines Area about the conversation. She said that it was about a later flight. (R.pp. 24-25; T.pp. 26-27, 30).

The next flight from New York Kennedy was due at 9:00 p.m. Agent Turbeville called Detective Privette and requested assistance in identifying the person who might get off the next flight. Detective O'Shields and other officers were also requested to assist. (R.p. 24; T.pp. 27, 62-63). Agent Turbeville checked the passenger list of Eastern Airlines. The defendant's name did not appear on either the 4:00 p.m. or the 9:00 p.m. flight from New York. (R.p. 25; T.p. 30).

At approximately 8:30 p.m. Elbert Porter and the elderly man returned to the terminal. Elbert Porter went back outside and waited in the car. Some of the officers were keeping surveillance on Elbert Porter and the elderly man while Agent Turbeville and Detective Liggins waited at the gate area. (R.p. 24; T.p. 28).

Shortly after 9:00 p.m. the Eastern flight from New York arrived. The defendant got off the plane. Officer Liggins pointed her out to Agent Turbeville as being Pearl Porter. Officer Liggins recognized her from prior investigations of drug trafficking in the area. (R.p. 24; T.pp. 64, 87). The defendant was carrying a purse and a wrapped box. She met the elderly man in the lobby. Without speaking she handed the wrapped box to the elderly man. They walked toward the front door. The elderly man handed the package back to the defendant and started towards the baggage claim area. As the defendant started out of the lobby toward the front door, Officer Peoples spoke to the defendant saying, "How are you doing, Pearl?" She replied, "Fine." Agent Turbeville walked up behind her and identified himself as a State Bureau of Investigation Agent and asked to see her airline ticket. (R.pp. 24-25; T.pp. 29-32).

The officers were dressed casually. No one was showing a weapon. No one told the defendant that she had to show her identification or go to the office. No one threatened her. She did not request an attorney. (R.p. 25; T.pp. 32, 90).

The defendant said that she had left her ticket on the airplane. Agent Turbeville asked her for some sort of identification. She started going through her purse, but she was carrying the box and the purse and was having trouble with them. A lot of people were going out the doorway. Agent Turbeville asked her if she would like to step to an office a short distance away from the doorway. [Although the trial court found that the office was 40 feet away from the doorway, the transcript indicates that it was 4 to 5 feet away. (T.p. 31).] The defendant said she

would. This conversation only took a few seconds. She freely and voluntarily accompanied Agent Turbeville to the office. (R.pp. 25, 32-33; T.pp. 31, 89).

Agent Turbeville did not tell the defendant that she had to go into the office although in his own mind, he would not have let her walk away. He did not consider her to be in custody at that point. (R.p. 27; T.pp. 33, 46-47).

This office was the North Carolina Interdiction Unit office. It had a glass door. Officer Liggins and a female officer came in. Other officers came in and out. (R.pp. 27, 29; T.pp. 51-52, 121).

The defendant opened her purse and took out an identification card with the name Pearl McNeil Porter, which she handed to Agent Turbeville. She told Agent Turbeville that she had been traveling under her own name. Agent Turbeville knew that this was false because he had already checked the passenger list. (R.pp. 25-26; T.pp. 33, 35, 42).

Agent Turbeville said he was conducting a narcotics investigation and would like her cooperation. He asked her for permission to look in her purse. He did not tell her that she was free to leave or that she had a right to refuse permission to search the purse. He did not threaten her or tell her that she had to. She freely and voluntarily consented. She said yes, go ahead. She handed the purse to Agent Turbeville. (R.pp. 25, 29, 32; T.pp. 33, 91).

Agent Turbeville asked the defendant if she had checked on any luggage. She said no. Agent Turbeville asked to check the package. She said he could. It was

opened and turned out to be a punch bowl. (R.p. 25; T.pp. 33-34). In searching the defendant's purse, Agent Turbeville saw a small piece of wrapped up tin foil. He opened it and handed it to Officer Liggins and asked Officer Liggins what it was. Before Officer Liggins answered, the defendant said, "That is hash. I forgot it was even in there." (R.pp. 25, 32; T.p. 34). Agent Turbeville went outside and talked with Officer O'Shields. Officer O'Shields had been following the elderly man. He had seen the elderly man go to the luggage area. The elderly man had approached the luggage area, had turned around and looked at Agent Turbeville and the defendant going into the office, and had then backed away from the luggage conveyer belt and had stood against the wall watching the office. Officer O'Shields conveyed this information to Agent Turbeville. Officer O'Shields and Agent Turbeville looked at approximately five to seven unclaimed bags. The only female name was Barbara Williams. (R.pp. 27-28; T.pp. 66-68).

Agent Turbeville and Officer O'Shields went to Eastern Airlines Office. The defendant's name did not appear on the passenger list. Barbara Williams was listed as a passenger who missed the 4:00 p.m. flight from New York and had made the 9:00 p.m. flight. (R.p. 29; T.p. 35).

The officers paged Barbara Williams two to three times. They telephoned a Barbara Williams listed in the local telephone book and asked her if she had luggage at Raleigh Durham Airport. She said she did not. (R.p. 29; T.p. 119).

Agent Turbeville took the fold-up bag with the name Barbara Williams into the office and showed it to the de-

fendant. The defendant denied that it was hers. (R.p. 26; T.p. 115).

Agent Turbeville and Officer Waller went outside to the car and identified themselves to Elbert Porter. They asked Elbert Porter to come into the terminal. In the terminal Officer O'Shields approached them. He had known Elbert Porter for some time. Elbert Porter told Officer O'Shields that he and the elderly man were there to pick up the defendant, that she had missed the 4:00 p.m. flight from New York and that she had luggage. He pointed to the fold-up bag with the name Barbara Williams. Officer O'Shields conveyed this information to Agent Turbeville. (R.p. 28; T.pp. 34, 69-70, 115).

Agent Turbeville took the bag and went into the office. At that point the defendant was placed under arrest for possession of hashish. After she was arrested she said that she wanted an attorney. (R.p. 26; T.p. 36).

The second time Agent Turbeville asked the defendant if the bag was hers. She said no. (R.p. 29; T.pp. 115-116). She had already denied that she had luggage and had denied ownership of the bag before being arrested.

Although the defendant was never read her *Miranda* rights, after her arrest, other than the third questioning regarding her luggage, no attempt was made to elicit a statement from her. Before her arrest she had not requested an attorney. At no time had anyone made any threats or drawn any weapons. She had not asked to leave and had not indicated that she did not want to continue to voluntarily cooperate. She had been in the office only 35 to 40 minutes. (R.pp. 26-27, 29; T.pp. 41, 120-121).

Agent Turbeville took custody of the bag pending the obtaining of a search warrant for the bag. The defendant was taken before the Wake County Magistrate on the hashish charge. The defendant was charged with misdemeanor possession of hashish and was released on her own recognizance bond. On her way out of the Magistrate's Office she stopped by the doorway where the officers were drawing the search warrant. The officers told her that they were drawing a search warrant. They asked her if she wanted to stay. She said no. She walked out saying, "No you won't be seeing me again." (R.pp. 26, 28; T.pp. 37, 59, 72).

In applying for the search warrant, Agent Turbeville set forth detailed facts in his affidavit including the information given to him by his reliable informant, the observations he made, and the information he was given by other officers during that day at the airport. (R.pp. 7-10).

A search warrant was issued. In a search of the defendant's bag, the officers found a piece of tin foil wrapper around a bag of white power. The white powder was analyzed to be 27.9 grams of 85% pure heroin. (R.p. 26; T.pp. 38,40).

The defendant was charged with the felony of trafficking in heroin. She made a pretrial motion to suppress all evidence obtained as a result of her seizure at the Raleigh Durham Airport. This motion was denied. (R.p. 25). She was tried and convicted of the felony of trafficking in heroin. She pled guilty to misdemeanor possession of hashish. (R.p. 38).

The defendant appealed to the North Carolina Court of Appeals assigning as error the search and seizure ques-

tions. The Court of Appeals found no error and affirmed her convictions. The defendant appealed as a matter of right to the Supreme Court of North Carolina and filed in the alternative a petition for discretionary review. The North Carolina Supreme Court dismissed the defendant's appeal and denied the petition for discretionary review.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I.

The Decision of the North Carolina Court of Appeals to Affirm the Trial Court's Order Denying the Petitioner's Pretrial Motion to Suppress Evidence of Heroin Found in Her Luggage Is Not in Conflict With the Holding of Florida v. Royer, 460 U.S. —, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) or With Decisions of the United States Supreme Court Involving the Fourth Amendment Because the Petitioner Was Not Unconstitutionally Seized by Law Enforcement Officers at the Door of the Airport Terminal and the Search of Her Purse and Discovery of Hashish Therein Was Not Unconstitutional.

The petitioner argues that the decision of the North Carolina Court of Appeals is in conflict with *Florida v. Royer, supra.* The decision of the North Carolina Court of Appeals is not in conflict with the *Royer* decision. In fact, *Royer* supports the decision of the North Carolina Court of Appeals.

In *Royer*, the defendant was observed at Miami International Airport. He fit the so called drug courier profile. Detectives approached him and asked for his ticket and driver's license. The ticket bore the name Holt while

the driver's license had the defendant's correct name Royer. When asked about this discrepancy, Royer explained that a friend had made the reservation in the name of Holt. The detectives —told him that they had reason to suspect him of transporting narcotics. They did not return his ticket and driver's license but asked him to accompany them to a room 40 feet away. He went without response. The room was described as a large storage closet. The officers brought his baggage into the room and asked for his consent to search the suitcase. Without response the defendant unlocked one suitcase. Drugs were found. He did not object to the officers breaking open the second suitcase in which marijuana was found.

The court held that on the facts of the case, Royer had been seized before he consented to the search and that the officers did not have probable cause to arrest, therefore, the consent was invalid. Although the officers had reasonable suspicion to justify an investigative detention and "had Royer voluntarily consented to the search of his luggage while he was justifiably being detained on reasonable suspicion, the products of the search would be admissible against him," 103 S. Ct. at 1362, by the time Royer consented he was as a practical matter already under arrest. The court emphasized that the officers had not been satisfied with his explanation of the discrepancy in names, they told him that they suspected him, he was in danger of missing his flight, and the officers had retained his ticket and driver's license. Further, the Court found that there was no probable cause to arrest Royer before the bags were opened.

The present case is distinguishable on its facts in that (1) the defendant was not seized, and (2) even if she had

been seized, Agent Turbeville already had probable cause to suspect her of transporting narcotics. Specifically, the defendant consented to go to the office a short distance away. A crowd of people had been going in and out of the door and she was having difficulty with her packages. The officers did not retain a ticket or identification. She was not told that she was a suspect. She was deplaning and, therefore, not in danger of missing a flight. The room was not a small storage closet but an office with a glass door. Early in the conversation she consented to a search of her purse because she had forgotten that it contained hashish. Thus, at the time her purse was searched she was not seized and the search was legal. As noted in *Florida v. Royer, supra:*

> [I]f the events in this case amounted to no more than a permissible police encounter in a public place or a justifiable *Terry*-type detention, Royer's consent, if voluntary, would have been effective to legalize the search of his two suitcases. 103 S. Ct. at 1326.

Further, in the present case, the search and seizure would have been legal in any event because Agent Turbeville had probable cause to arrest the defendant based on information he had received from reliable informants, which information accurately matched the occurrences he observed at the airport, and based on his knowledge that the defendant was traveling under a false name.

The conclusion that evidence was not illegally obtained from the defendant because she was not illegally seized and because the officers had probable cause to suspect her of trafficking in narcotics is supported by recent decisions. First, it is basic law that not every encounter between a police officer and a citizen is a seizure under

the Fourth Amendment requiring objective justification. *Sibron v. New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). Only when the officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may it be said that he has been seized. *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 899 (1968).

This is supported by the recent decision of *United States v. Mendenhall,* 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). There agents observed a woman who appeared to be characteristic of their drug courier profile. They approached her, identified themselves, and asked to see her ticket and identification. They noted a discrepancy between the names on her driver's license and the ticket. They returned these to her and asked her to accompany them to their office. She agreed. She consented to a search of her purse and person. Drugs were found in her underclothing. The court held that no seizure had occurred.

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. 446 U.S. at 554.

The court noted:

> The subjective intention of the D.E.A. agent in this case to detain the respondent had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent. *Id.* at 554 N. 6.

The court continued:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to

> leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. (Citations omitting). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot as a matter of law, amount to a seizure of that person. *Id.* at 554-555.

In the present case, nothing in the record suggests that any of the examples cited by the court in *Mendenhall* were present or that the petitioner had any objective reason to believe that she was seized. Thus, in the absence of such evidence, the initial approach of the defendant was not a seizure.

In *Mendenhall,* the court further considered whether the defendant was seized when she was taken to the DEA office. The trial court had found that the defendant went to the office voluntarily. The Supreme Court found that this finding was supported by the evidence, therefore, it would be error to substitute a different finding. The court held that the question of consent is to be determined by the totality of all the circumstances and that under the facts, the defendant's consent was valid. It was not preceded by an impermissible seizure of her person, she was not told that she had to go to the office, and there were no threats or show of force.

In the present case the trial court found that the petitioner voluntarily went to the office and consented to the search of her purse. This finding is supported by the evidence, therefore, it is conclusive and binding on appeal. *United States v. Mendenhall, supra; State v. Cooke,* 306 N.C. 132, 291 S.E. 2d 618 (1982).

In *United States v. Place*, — U.S. —, — S. Ct. —, 77 L. Ed. 2d 110 (1983), the United States Supreme Court held:

> When an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that arouse his suspicion provided that the investigative detention is properly limited in scope. 77 L. Ed. 2d at 120.

In *Place*, the court found that the officer's conduct in seizing the defendant's luggage and subjecting it to a canine "sniff test" exceeded a *Terry*-type investigation and that the seizure of the luggage violated the Fourth Amendment because the officers did not have probable cause, the defendant did not consent to the search, there was a prolonged detention for 90 minutes, and the officers failed to notify the defendant where they were taking the luggage or how it could be returned.

In the present case, the petitioner was detained for only 35 to 40 minutes, she consented to a search of her purse in which hashish was discovered, and information provided by an informant and the observations of Agent Turbeville gave him probable cause.

The second reason that evidence was not illegally seized from the petitioner is that the officers had probable cause to suspect the petitioner of trafficking in narcotics before they approached her. This is supported by the facts and by recent decisions.

In *United States v. Woods*, 320 F. 2d 1022 (9th Cir. 1983) an informant told an officer that the defendant,

a woman, sold drugs, that the defendant had told him that drugs would be coming in from back east, that the defendant and her son would meet a passenger arriving on a plane with cocaine, and that the defendant had $7,000.

The officer arrived at the airport and observed a woman and a boy meeting the description given to him by the informant with another woman. The defendant showed the other woman a box and allowed the other woman to look through it. Based on his experience, the officer concluded that this was a money show. The other woman purchased a round trip ticket to New York.

The officer approached the two women in the cocktail lounge. It was his undisclosed state of mind that they were not free to leave. He took the ticket from the other woman and did not return it. He questioned the other woman and received a false answer as to her travel plans.

Both women were taken to the Harbor Police Station to continue the investigation. The defendant told the officer that the box she was carrying contained $6,000. Both women were arrested. The box was searched and $6,143.00 was seized. The other woman was searched and cocaine was located in baggies tied around her ankles.

The court held that under *Royer*, the women were effectively under arrest when they were taken to the police station, but that they were not seized at the airport and that statements made at the airport were admissible.

The court held that the facts known to the officers prior to confronting the women created a reasonable suspicion that the women were involved in a narcotics transaction. The officer had received information from an informant, which information was verified by the officer's

personal observations. Thus, the facts known to the officer at the time he approached the women were sufficient to establish probable cause to arrest and were clearly enough to raise a reasonable suspicion.

Citing *Draper v. United States*, 358 U.S. 307, 179 S. Ct. 329, 3 L. Ed. 2d 327 (1959) the court noted that where the details of an informant's information have been independently verified by the officer, probable cause can be established.

In *State v. Coffey*, 65 N.C. App. 751, 310 S.E. 2d 123 (1984), after a small airplane landed at Raleigh Durham Airport to refuel, the defendant, who was the pilot, attempted to leave. Officers, acting on information that the defendant had been involved in a marijuana delivery, "asked" him to stay and patted him down for weapons. Citing *United States v. Mendenhall, supra*, the North Carolina Court of Appeals held that the defendant in effect had been seized. Officers requested permission to search the airplane. The defendant acquiesced. Evidence was discovered in the airplane. Before trial, the defendant moved to suppress this evidence. The court held that based on the information the officers had received before they seized the defendant, they had probable cause and, therefore, his seizure was not illegal, his consent was freely given, and the search was not unlawful.

In the present case, even if the petitioner had been seized at the terminal door, Agent Turbeville already had probable cause based on the information from his reliable informant, which he had verified by his personal observations, and based on his knowledge that the petitioner was travelling under a false name, therefore, the seizure and subsequent search were not illegal.

II.

The Search Warrant Issued for the Search of Petitioner's Luggage Was Issued on Sufficient Probable Cause.

The petitioner next argues that there was insufficient probable cause for the issuance of the search warrant in that the affidavit (1) did not set forth the prior reliability of Agent Turbeville's informant, (2) relies on the finding of the hashish which the petitioner contends was illegally seized, (3) relies on untruths told to the officers by the petitioner after she was seized in violation of *Miranda*, and (4) the baggage was seized 5 hours before an attempt was made to get a search warrant and, therefore, violated *United States v. Place, supra.* Each of these arguments is unsupported by the facts and the law.

First, the facts set out in detail in the affidavit show that the information supplied by the informant was corroborated by Agent Turbeville's observations and found to be accurate. Thus, under the totality of the circumstances, the Magistrate could determine that the informant was credible. *Illinois v. Gates*, 462 U.S. —, 103 S. Ct. —, 76 L. Ed. 2d 527 (1983) (anonymous letter plus corroboration held sufficient); *Draper v. United States, supra.*

Second, as noted above, the hashish was not illegally seized and was properly considered by the Magistrate as evidence to establish probable cause.

Third, the false statements made by the petitioner that she was travelling under her own name and that she had no luggage were made before she was seized and arrested and, therefore, were properly considered by the Magistrate to establish probable cause.

Fourth, the baggage was not seized five hours before an attempt was made to get a warrant. The petitioner was only held 35 to 40 minutes at the airport before she was arrested. When she was arrested the officers took custody of the luggage and went to the Magistrate's office to draw and obtain a search warrant. This was well within the 90 minute limitation of *United States v. Place, supra.* Further, in *Place* the officers did not have probable cause; whereas, here the officers did have probable cause before the luggage was seized.

In summary, the detailed information set forth in the affidavit more than sufficiently established probable cause, therefore, the search warrant was valid.

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CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Pearl Jean McNeil Porter's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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